U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 January 2006

Case No.: 2005-ERA-6

In the Matter of:

JAMES SPEEGLE,
Complainant

vs.

STONE & WEBSTER CONSTRUCTION, INC.,
Respondent

APPEARANCES:

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On Behalf of Respondent

BEFORE: RICHARD D. MILLS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 211 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. §§ 5851 *et seq.*, and the implementing regulations thereunder at 29 C.F.R. Part 24.

This claim is brought by James Speegle, Complainant, against his former employer, Stone & Webster Construction, Inc. ("S&W"), Respondent. Speegle alleges that S&W has taken adverse employment actions against him in retaliation for his engagement in protected activities. This matter was referred to the Office of Administrative Law Judges for a formal hearing, which was held on June 21-24, 2005, in Huntsville, Alabama. During this hearing, both parties were given the opportunity to offer testimony, documentary evidence, and oral arguments. The following exhibits were received into evidence.[1]:

1. Complainant's Exhibits Nos. 5-7, 11, 13-16, 18, 21, 23-26, 30, 33, 39-42, 47-48, 58, 61, 63-64, 66, 70-71, 72,[2] 74;

2. Respondent's Exhibits Nos. 1, 3-4, 6-9, 11-15, 19-24, 26, 28, 30-32, 41-46, 48-55, 59-66.

Upon conclusion of the hearing, the record remained opened for the submission of post-hearing briefs by Complainant and Respondent, the last of which was received on October 24, 2005. After giving full consideration to the entire record, evidence introduced, and arguments presented, the Court makes the following Findings of Fact, Conclusions of Law, and Recommended Order.

STIPULATIONS

After an evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

1. Respondent is an employer covered by Section 211 of the ERA.[3]

2. Complainant is an employee covered by Section 211 of the ERA.[4]

[1] The following abbreviations will be used in citations to the record: CX – Complainant's Exhibit; RX – Respondent's Exhibit; and TR – Transcript of the proceedings.
[2] Questions and Answers Nos. 6, 11, 17, & 18.
[3] TR 8.
[4] TR 9.

ISSUES

The unresolved issues in this proceeding are:

1. Whether Complainant engaged in protected activity under the law; and

2. Whether Respondent took adverse employment action against Complainant due to this protected activity.

SUMMARY OF THE EVIDENCE

A. Complainant's Employment Background

Complainant, James Speegle, is a journeyman painter with fifteen years of industrial painting experience. TR 39-40. He was an employee of Stone & Webster Construction, Inc. ("S&W) at the Browns Ferry Nuclear Plant from 1993 until his termination on June 1, 2004.[5] TR 40-41. At the time of Complainant's termination, Respondent, S&W, held a construction contract for paint coatings repair work at the Browns Ferry Nuclear Plant, which is owned and operated by the Tennessee Valley Authority ("TVA"). RX-46. The parties stipulate that S&W is an "employer" and that Speegle is an "employee" covered by Section 211 of the ERA, 42 U.S.C. § 5851. TR 8.

In the spring of 2003, S&W hired Speegle to work on the "Unit 1 Restart Project" at Browns Ferry. The project entailed repairing the paint coatings inside "the Torus," a large doughnut-shaped vessel surrounding the reactor core in Unit 1 of the plant. TR 70, 579. S&W and the site engineers originally determined the scope of the project to be a ten percent repair of the paint coating inside the Torus. TR 579-584. Painting crews were instructed to identify failed coating spots in each bay of the Torus, remove the failed coating, prepare the surface, and apply new coatings. TR 586. Speegle was made foreman over a crew of painters in approximately January 2004. TR 49. He worked under the direction of S&W's Super General Foreman, Sebourn Childers.

B. Complainant's Safety Concerns

Speegle alleges that he repeatedly complained to S&W that it was engaged in practices which he believed to be violations of nuclear-safety laws, relating to the preparation, application, and maintenance of paint coatings in the Torus, a Service Level

[5] The parties stipulated that Complainant's last official day on the payroll was June 1, 2004; however, the date of Speegle's actual termination from S&W was May 24, 2004. At the time of his termination, Complainant was formally on the payroll of Shook & Fletcher, a subcontractor of S&W. However, S&W terminated Complainant. TR 888.

1 area of the Browns Ferry Plant. Comp. Amend. Complaint ¶ 1. He testified that he raised safety concerns to his supervisor, Childers, on several occasions and also complained to the Nuclear Regulatory Commission ("NRC").

1. Complainant's Concern: Movement of Crews from Bay-to-Bay

Speegle testified that the Torus was comprised of sixteen large bays, each containing various spots of failed coatings. TR 88. He alleged that he was instructed by Childers to move his crew from one bay to another before the bay was completed. He believed this movement created a nuclear safety problem because it increased the likelihood that a failed coating spot would be missed. TR 88-89. He testified that he verbally complained to Childers on several occasions, including during a safety meeting. TR 89, 346-348. Speegle could not recall if he posed his complaint as a safety concern. TR 346. He testified that Childers told him he should follow instructions regardless as to what was being left behind and said, "Confusion is money." Speegle interpreted Childers' comment to mean that if they make the job more difficult, more money could be made. TR 89-90.

Childers acknowledged that Speegle raised a concern about moving the crews from bay to bay, but stated that Speegle did not pose his concern as a nuclear safety risk. TR 635-636. Childers testified that the movement from bay to bay was necessary due to the use of different crews for surface preparation and painting. Additionally, crews were moved when pipe fitters performed welding and were sent back into the bay to paint the welded areas. He admitted that crews were sometimes instructed to remove recently applied paint from the welds to facilitate inspection of the welds by Engineering and were then instructed to reapply the paint. TR 637-639.

2. Complainant's Concern: Failure to Address Mechanical Damage

Speegle also testified that crews were instructed to address only spots where the paint coating itself had failed and not spots where the paint coating had suffered mechanical damage. TR 92. He believed that repairing both failures at the same time would be more efficient. TR 351. He testified that he verbally complained to Childers about this approach, who responded that the mechanical damage would be addressed later. He testified that Childers' again said, "Confusion is money." TR 93. He testified that he heard this comment four to six times between January and May 2004. TR 93. Smith, a fellow journeyman painter, also testified that she heard Childers say, "Confusion is money."[6] Atkinson, another journeyman, testified that he heard Childers say the

[6] Smith testified that she interpreted the phrase to mean that the more confusion that is made, the more money they would make. TR 466-467.

phrase more times than he can count.[7] TR 466-467, 557. Speegle testified that as a result of his continued complaints, Childers grew from a little mad to furious and eventually stopped answering his questions. TR 94.

Childers testified that he never made the statement, "Confusion is money." TR 798-799. He also testified that he told Speegle that the scope of the project dictated that the mechanical damages be addressed at a late date. TR 351. He testified the site-coating specialist instructed the crews on which failed coatings to repair. TR 586. Gero, S&W's Lead Civil Superintendent, testified that he had a conversation with Speegle about the issue of repairing failed coatings versus mechanical coatings in the Torus and that the scope of the repair was explained to the crews by several experts. TR 1031.

3. Complainant's Concern: Certification of Apprentices

Speegle testified that in early May 2004, S&W notified the crew that it was going to begin certifying apprentice painters to perform work inside the Torus. Speegle believed this to be in violation of the requirements of the G-55 Specification, which specifically stated that journeyman painters were to do Service Level 1 work. TR 97. He additionally believed that apprentices lacked the experience to safely apply nuclear coatings. TR 97.

a) Guidelines for Safety-Related Coatings Application

(1) The G-55

The G-55 is a General Engineering Specification issued by TVA entitled "Technical and Programmatic Requirements for the Protective Coating Program for TVA Nuclear Plants." RX-23, p. 1. The G-55 is a well-known manual in the nuclear painting field and contains guidelines for coatings application in the safety-related areas of a nuclear plant. TR 86. Speegle referred to the G-55 as "the Bible," because painters are expected to follow its procedures without deviation. He described the procedures mandated by the G-55 as nuclear safety-related because they are designed to prevent coatings failure. TR 51-53, 552. Speegle testified that he is intimately familiar with the G-55, having looked through the entire guide ten to fifteen times and referencing it for specific questions on several occasions. TR 69-70.

[7] Atkinson testified that any time Childers was questioned about something being done incorrectly, he would say not to worry about it or that confusion is money. TR 558. He took the phrase to mean that Childers could make personal gain by having to do something more than once. TR 563.

(2) Service Level 1 Areas and the Torus

The G-55 defines a Service Level 1 area as follows: "An area inside the reactor containment where coating failure could adversely affect [by producing solid debris (as paint chips)] the operation of the post-accident fluid systems and, thereby, impair safe shutdown." RX-23, p. 10; TR 50, 54. The Torus is a Service Level 1 area. It is a large vessel surrounding the reactor core of the plant that holds over one million gallons of water. In the event of a system meltdown, the water would be flushed from the Torus into the reactor core to cool it down. TR 70.

(3) Acceptable Coating System

An "acceptable coating system" is defined by the G-55 as, "[a] safety-related coating system for which a suitably for application review which meets the plant licensing requirements has been completed and there is reasonable assurance that, when properly applied and maintained, the coating will not detach under normal or accident conditions." RX-23, p. 10.

(4) Appendix A of the G-55

Appendix A is entitled "Qualifications of Journeyman Painters for Coating Service Level I Areas of Nuclear Power Plants." RX-23, p. 35. The purpose is to "establish specific guidelines for the qualification of journeyman painters responsible for the application of safety-related coatings to concrete and steel surfaces at TVA nuclear facilities." RX-23, p. 36. Appendix A defines a journeyman painter as "[a]ny individual who has worked in the painting trade sufficiently to master the use of all applicable tools and the materials to be applied." RX-23, p. 36. In the main body of the G-55, the same definition is used for the term "coating applicator." RX-23, p. 10. Appendix A specifies that "a Journeyman Painter must be certified prior to applications in the CSL I [Service Level I area] and CSL III area(s)." RX-23, p. 36.

Appendix A, Revision 12, references ASTM standards 4227 and 4228, 1983 versions, which uses the term "journeymen painters." However, the 1999 version of the ASTM standards uses the term "coating applicator." TR 592-593; RX-23, p. 36.

b) Employer's Decision to Certify Apprentices

Gero, S&W's Lead Civil Superintendent, testified that he first discussed the possibility of certifying apprentice painters to perform work inside the Torus with Sebourne Childers. TR 590. The need to certify apprentices arose out of the unexpected increase in the scope of the Torus project. Childers testified that he pointed out to Gero that the language of the G-55 required the use of "journeyman painters" in the Service

Level 1 areas. TR 590, 1030. Gero then contacted the site engineers, Bechtel Engineering, regarding the meaning of the terminology. Bechtel Engineering verbally clarified that the term "journeyman painter" was synonymous with the term "coating applicator" and that Service Level 1 work did not require the use of a journeyman in the union sense of the term. TR 590, 1031. Likewise, the corporate office told him that "journeyman" meant only the proficiency of being able to pass the requisite certification test. TR 1028. At Childers's request, Gero asked TVA for written documentation, reflecting a clear change of the G-55's terminology from "journeyman painter" to "coating applicator." TR 590-591, 1035.

The documentation requested by Gero was an Engineering Work Request ("EWR"). TR 321. An EWR is a document from the Engineering department that approves a change to the G-55 without the issuance of a new revision of the entire G-55. TR 594. The EWR at issue is dated May 20, 2004 and is entitled "G-Spec Exception." It states, "This exception is being written to revise and update terminology used in an earlier ASTM Standards (1983) edition to reflect the terminology of ASTM Standard (1999). The term *Journeyman* should be changed to coating applicator throughout the specification. This change upgrades G-55 to agree with ASTM D4227 and D4228, 1999 version." RX-13.

Childers testified that the intent in certifying apprentices was to only select those he believed knowledgeable enough to perform the work. He stated that he selected four apprentices with exceptional skills whom he thought could pass the TVA certification process. TR 603. Apprentice certification began as early as May 19, 2004. TR 804-805.

c) *Employer's Notice to Journeymen*

Childers testified that he told the journeymen about the pending certification of apprentices for Torus work in early May 2004. He communicated to the journeymen that Gero spoke with corporate engineering, which verbally stated that the terms "journeyman painter" and "coating applicator" were interchangeable. TR 666-668. He told the journeymen that the EWR would be written. TR 600. Childers testified that there was above-normal anger amongst the painters. TR 600. Childers described that the painters were bitter towards him and various painters made vicious remarks against him. TR 600-601. He stated that the controversy was a nightmare for him. TR 670. Childers testified that he received several complaints from employees that apprentices would be taking journeyman positions and drawing apprentice wages. TR 602-603. He additionally received complaints about the lack of qualification of the apprentices. TR 603. Childers testified that in response to the complaints, he told the employees to pursue higher avenues of complaint and assured them they would not be retaliated against. TR 610. He

testified that the painters continuously opposed the plan, and he informed Gero of the continuing concern. TR 669. Childers admitted that the painters' belief that the G-55 was being violated was initially reasonable; however, once the EWR was issued, it was official that the G-55 was not being violated. TR 671.

Gero also testified that the painters constantly refused to accept corporate's decision. TR 1029-1029. He attended morning safety meetings and explained the intent of the change to the painters. TR 1036. Gero insisted that the issue was about the word journeyman and was never brought up as a safety issue. TR 1049, 1082. Yet, he admitted that the painters were concerned that the apprentices were not capable of applying the coatings and that this was a nuclear safety concern. TR 1028-1029. He testified that the painters' interpretation of the G-55 was reasonable for some time. TR 1062. However, he considered them arrogant in the way they responded to the issue. TR 1074.

d) *Complainant's Complaints to Employer*

Speegle testified that he began raising concerns about the certification of apprentices in early May 2004. TR 125. Speegle stated that he complained to Childers that apprentices did not have enough knowledge and experience in the painting field to perform Service Level 1 work and that the certification test to be used for apprentices was poor. Speegle believed that the language of the G-55 specifically mandated that journeymen, not apprentices, perform Service Level 1 work and additionally required the painter to be certified to apply the coatings. TR 136-138. He believed that apprentices had not yet "mastered the use of all applicable tools and materials," as required by the G-55 definition and that only journeymen are masters of the trade. TR 100-102. Speegle testified that he thinks of his work with coating systems as safety-related, and he demonstrated an understanding that a coatings failure in the Torus could cause the reactor core not to cool down in the event of a system meltdown. TR 72. Speegle testified that he spoke to Childers at three safety meetings and individually on one or two occasions. TR 126. He testified that Childers' told him that the G-55's terminology change was the company's decision so that apprentices could work inside the Torus. TR 127-128.

Childers admitted that Speegle complained to him that he did not think the apprentices were qualified to do the work in the Torus and that he believed the certification violated the G-55. TR 661-662. Childers testified that Speegle raised his concerns several times, almost daily. TR 604. Childers agreed that initially, Speegle's belief that the certification of the apprentices would be a violation of the G-55 was reasonable; however, Speegle never accepted the company's final decision. TR 662-664.

Gero testified that he also had discussions with Speegle several times about the issue and he was aware of Speegle's strong opposition to the use of apprentices. TR 1059, 1082-1083. Gero described a particular instance when Speegle came into his office regarding the issue. He testified that their discussion was primarily about the meaning of the term journeyman in the G-55, and Speegle's position was that the term meant only a union journeyman could perform the work. He told Speegle that an apprentice who could pass the test could work in the Torus in accordance with the G-55. Gero stated that the result of the discussion was that they agreed to disagree. TR 1029-1030. Gero testified that this disagreement had nothing to do with his decision to terminate Speegle. TR 1030. Gero stated that Speegle never complained that the apprentices were not qualified to do the work. TR 1060.

Gero gave conflicting testimony regarding whether the issue of apprentice certification was ever brought up as a safety concern. At the formal hearing, he testified that the issue was never brought up as a safety concern. TR 1049. But this testimony was impeached with his deposition testimony, where he agreed that the painters were concerned about safety, including Speegle. TR 1051. Gero testified that he misspoke at the deposition. TR 1053. However, he admitted that if someone was concerned that S&W was using unqualified people who were not adequately tested in the Torus, then that would be a nuclear safety concern. TR 1053. He also admitted that Speegle said the apprentices were not qualified. TR 1083.

Cook and Frazier, two fellow journeymen, both testified that they personally witnessed Speegle raise safety concerns regarding Level 1 coating issues. TR 222, 508-509. Cook testified that Childers was unresponsive to Speegle, "basically stating that it wasn't James' concern." TR 222. He also witnessed Childers cut Speegle off. TR 223. Cook testified that he never heard Speegle raise concerns about union job preservation. TR 255-256. Frazier recalled that Speegle began raising safety concerns over the coatings in the Torus approximately two to three weeks prior to May 22, 2004. TR 509. Atkinson testified that he had conversations with Speegle where he was very adamant that apprentices were not being qualified to apply coatings in the Torus. TR 552-553.

e) *Other Employees' Complaints*

Cook, Thompson, Smith, and Ferrell each testified that he or she complained about apprentices performing coating removal work inside the Torus. Cook spoke with Gero. TR 258. Thompson talked with Childers about this concern, but stated he did not pose it as a safety issue. TR 430. Smith testified that she questioned Childers on a weekly basis and complained to the NRC on May 19, 2004. TR 471-472. She testified that when she questioned the use of apprentices at a safety meeting, Childers ignored her. TR 455-456. She was not disciplined for raising this concern. TR 472. Smith agreed that a majority of the journeymen questioned Childers about the certification of

apprentices. TR 470. Ferrell voiced his concerns to Childers and was told that he was working for S&W and should do what he was asked. TR 496-497. He testified that he told Childers that certifying apprentices was opening the door for mistakes, but later stated he never complained about anything unsafe at the plant. TR 498, 503. In his testimony, Ferrell agreed that the certification of apprentices was now appropriate due to the official change of the G-55. TR 502.

Several of the painters testified as to the connection between nuclear safety and the use of unqualified painters. Smith testified that if paint came loose in the Torus and fell into the strainers, it could cause the motor to stop, which would shut down the unit. TR 453. Thompson testified that using unqualified painters would be a safety concern because a coating failure in the Torus could cause blockages in drains, strainers and pumps, which could diminish the water flow in the event of a radiological emergency. TR 427. Coggins opined that only a journeyman who has years of experience can properly apply protective coatings in such a critical area, and he believed that apprentices do not have enough experience. TR 408. However, Ferrell stated that he was totally opposed to the certification of apprentices, because there were journeymen painters who were not yet certified who could have fulfilled the need. TR 487-488.

Frazier, the job steward, agreed that there was talk about the certification of apprentices among a number of painters. TR 535. He testified that some journeymen came to him to express concern that the certification of apprentices might lead to a loss of their jobs. TR 536. Among the painters who publicly voiced concerns were Jeff Weaver, Barbara Smith, and Jeremy Johnson. TR 536. Frazier agreed that he told the TVA Office of Inspector General that the main concerns of the journeymen were the pay of the apprentices for Level 1 work and that the apprentices would be certified when there were other journeymen that had not yet been certified. TR 540.

f) Problem Evaluation Report (PER)

A Problem Evaluation Report ("PER") is a TVA mechanism by which problems in the plant can be anonymously reported. A concerned employee can meet with a PER writer, who writes the PER and presents it to a review group made up of plant managers, including TVA and other contractors, and a member of the NRC. TR 596-597. Ralph Thompson testified that he wrote a PER regarding the certification of apprentices, prior to Speegle's termination. See CX-18; TR 130-136, 423. The PER was initiated on May 12, 2004 and reviewed on May 19, 2004. The PER stated the concern as, "apprentices with limited experience and little knowledge of G-55 or MAI 5.3 requirements have been certified at Browns Ferry Nuclear Plant with the intent of having them perform coating work in the Unit 1 Torus." CX-18. The PER was acted upon and the corporate engineer responsible for the G-55 was consulted. The determination was that the concern was a non-issue, as coating applicators, journeymen and apprentices were being qualified in accordance with the G-55. Thompson testified that he wrote the PER because he

believed that using inexperienced painters inside the Torus posed a safety problem. TR 429-430. Thompson admitted that he was not retaliated against for writing the PER or for raising concerns about the certification of apprentices. TR 441.

Albarado and Gero were familiar with the above-referenced PER, but did not know who wrote it. TR 967, 1055-1056. Gero testified that he did not remember if he thought Speegle had written the PER; however, at his deposition, he stated that when he did the interview with the Office of Inspector General, he believed Speegle to be the employee who wrote the PER. TR 1057-1058. Childers testified that he thought that Speegle had written a PER and recalled that Speegle told him he would write a PER, but was not sure if he wrote it. TR 777, 809. Speegle testified that the PER was posted on the bulletin board after it was initiated. TR 132.

4. Complainant's Concern: Insufficient Testing Procedure for Certification

a) Flat Panel Brush Test

Speegle also alleged that he complained to S&W that the flat panel brush test used to certify painters for Service Level 1 work was inappropriate. Speegle testified that he considered certification with the flat panel test to be a safety problem and complained to Childers that it should not be used. TR 125, 360. However, Childers testified that Speegle never complained to him that the brush test was unsatisfactory. TR 629.

Speegle explained that S&W formerly used a complex panel test for certification and that he certified on a complex panel test. TR 105-107. He estimated that S&W started using the flat panel test in March 2004. TR 116. Speegle identified Figure 1 in ASTM D4228-99 as a test panel similar to the one on which he certified. The figure depicted a complex panel with welded I-beams protruding from the surface. TR 115-116. He testified that only the complex panel appropriately simulated the work surface of the Torus, as required by Appendix A of the G-55 and by ASTM-D4228. TR 111.

Childers testified that the brush test is a limited qualification test for the repair work inside the Torus. Appendix A of the G-55 addresses limited qualifications and reads, "Should the need arise for a limited qualification, either for touch up, repair, or the application method, the Qualifying Agent shall determine the variables and adjust the qualification process as necessary." RX-23, p. 41. Childers stated that this gave him discretion in designing the qualification test according to the method and materials he felt applicable to the work done inside the Torus. TR 614-617. He testified that ASTM standard D-4228-99 also gives him discretion to administer limited qualifications with a test panel that varies from the complex panel shown in Figure 1. TR 617. He read, "Limited qualifications can be accomplished using only areas representative of the actual plant surface even though they do not include all areas represented in the figure." RX-7, p. 2. Childers testified that the flat panel brush test was sufficient because the scope of

Torus work was brushing on small spots. TR 652-653. Childers testified that he was aware of results of an NRC inspection report, which found that the limited flat panel brush test was not a violation of any standard. TR 629; RX-55, p. 16.

Gero had limited knowledge regarding the flat panel brush test. Although he testified that he observed painters taking the brush test, he testified that the panel in use during Speegle's employment was a panel with protrusions that required the painter to apply paint at the intersections of a pipe or beam. TR 1093-1096.

Cook, Thompson, and Atkinson testified that they certified for Level 1 painting on the flat panel test. TR 219, 443, 549. Thompson opined that the flat panel certification test was hardly representative of the conditions inside the Torus. TR 424. Thompson, Frazier, and Atkinson testified that when Williams Power took over the Torus project sometime after Speegle's termination, they recertified everyone using a complex panel test, where the panel was comprised of pipe protrusions from a hanging plate. TR 219-220, 425, 529, 562-563. Both Atkinson and Thompson stated that once the test was changed, painters had a more difficult time passing the test. TR 426, 563.

Childers testified that Williams Power changed the brush test panel partially because the coating system was different. He testified that Williams Power, TVA, and S&W all agreed to change the test panel. TR 619-623. He explained that all painters were required to do a re-certification with Williams Power due to a change in the coating system. TR 627. However, Childers admitted that when a PER was written challenging the flat panel test in June 2004, the Management Review Committee changed the flat panel test to a more complex test and took actions to ensure that painters would not be helped by more experienced painters during the test. [8] TR 687-688; CX-19.

b) Assistance During Testing

Speegle also testified that he saw Childers instruct painters while they were taking the test. However, he could not recall if he complained to Childers about painters cheating on the test. TR 123, 360. Childers testified that Speegle never complained to him about improper coaching during the tests. TR 635. Cook testified that he witnessed Childers coaching some people during the certification test. TR 237. He stated that, on one occasion, Childers instructed him to help Jerry Thigpin during a flat panel test when Thigpin did not apply the correct millage. Cook helped him reapply the paint, and Childers passed Thigpin. TR 239. Childers testified that he never allowed anyone to wipe off the panel and restart the test. TR 635. Childers acknowledged that he helped painters, but only on occasions when there was an accident that was not the fault of the painter. TR 630-631.

[8] PER 62773 was initiated after Speegle's termination. It was initiated on June 7, 2004 and addressed on June 17, 2004. CX-19.

Childers explained that certification consists of classroom instruction by a Qualifying Agent then administration of the qualification. He testified that the G-55 gives the Qualifying Agent discretion such that he can talk to the painters, remind them of what was covered in class, and ask them questions during the practical application test. TR 630-631. Two Qualifying Agents administer the test, one of who comes from the Quality Control Program, which is not under Childers' supervision. TR 634. He testified that at the time Speegle was employed, talking was permitted in the testing environment. TR 634.

NRC Allegation Report Number RII-2005-A-6, a response to concerns raised by Speegle, noted that the NRC could not substantiate his concern that painters who failed the qualification test were told that they could wipe off the panel and try again. However, the NRC did substantiate his concern that painters were coached or helped through the qualification test. TVA conducted interviews and observations and found coaching by experienced painters who helped inexperienced painters in the group test setting. TVA did not find coaching by Qualifying Agents. TVA also stated that none of the individuals who received assistance obtained their certification at that time. The corrective actions involved more monitoring of qualification testing by Engineering and changing the training to involve more consistent instruction and use of Appendix A. Painters were also informed that they could not receive any assistance while taking the test. CX-74.

c) Problem Evaluation Report (PER)

A PER was initiated and addressed on the subject of the testing conditions for the qualification of coating applicators, after Speegle's termination.[9] CX-19.[10] The PER Summary of Corrective Action Plan reflects that the Quality Control inspector determined that the test panel may not accurately represent the actual plant surfaces to be coated, that coatings applicators were being certified in the paint shop as a group, and that some individuals with little experience required assistance from the group to accomplish the task. CX-19, p. 1-2. After investigation, action was taken to change the certification test panel to accurately reflect the actual plant surfaces and to test the painters individually rather than in groups. It verified that the new qualification procedure met the requirements of G-55 and ASTM D42278. CX-19, p. 5.

C. Events Immediately Preceding Complainant's Termination

Speegle voiced his concerns at safety meetings three consecutive days prior to his termination. Safety meetings are held at the start of each shift and sometimes at midday. The purpose is to discuss safety issues at the plant, and workers are encouraged to ask

[9] The PER was initiated on June 7, 2004 and addressed on June 17, 2004. CX-19.
[10] CX-19 was not offered into evidence at the formal hearing. The Court finds CX-19 to be relevant to the issues at hand and hereby admits it into evidence.

questions and voice opinions. TR 140. The meetings took place inside of a trailer, where the painters were seated at rows of picnic tables. Childers led the meetings and stood at the front of the room. TR 154.

1. Safety Meeting of Thursday, May 20, 2004

Speegle testified that at the Thursday safety meeting, Childers announced that S&W was starting to certifying apprentices to work in the Torus. Speegle testified that he spoke up and stated that the apprentices did not have the knowledge to perform the work and that the G-55 clearly requires that journeymen work in Level I areas. He testified that Childers cut him off and told him, "This is the way we're going to do it. We're getting the G-55 changed to certify these apprentices and that's the end of it." TR 138-140. He testified that other painters also complained at the meeting and there was a heated discussion about the issue. Some painters were talking about this as a union or a job protection issue; however, Speegle testified that he was talking about it as a safety issue. TR 141-142.

Speegle testified that he approached Childers after the meeting and told him he thought there was a problem. He testified that Childers said, "No, we don't have a problem," in an arrogant manner then told him he "should not be opening [his] big mouth in bringing these subjects up." TR 142-143. At the formal hearing, Childers denied telling Speegle that he opened his big fat mouth too much. TR 604.

Cook was present at the Thursday safety meeting. He testified that he observed Speegle raise the issue with Childers and that Childers "shut him up" and ended the meeting. He testified that he also observed the exchange between Speegle and Childers after the meeting, because he was approaching Childers to ask him a question. He testified that Speegle said, "Well here's what the problem is . . ." and Childers said, "The problem is you open your big fat mouth too much and say things you shouldn't." Cook testified that he saw anger in Childers's face and heard it in his tone. Based on Childers's demeanor he decided not to ask him the question he intended to ask. TR 224.

Smith was also present at the Thursday safety meeting. She testified that Speegle tried to ask questions about the G-55 and Childers said there would be no more questions and ended the discussion. TR 456-457. Smith testified that she did not perceive Speegle to be more or less vocal than any of the other painters asking questions that day. TR 481.

2. Complaint to NRC on May 20, 2004

After the safety meeting, Speegle went to the onsite Nuclear Regulatory Commission office and filed an allegation report with Bill Bearden and Bob Holcomb regarding the certification of apprentices and the inappropriate testing. TR 145-146; CX-73. The report stated: "CI dropped in the resident office and complained that TVA's

program for qualification of painters working in Unit 1 Torus was not adequate. New apprentice with little or no experience are being qualified to perform painting when experienced painters are not being brought in to perform work. Conditions for performing painting in the Torus is much more difficult than seen in the controlled conditions in the paint shop where qualification exams are being given (not representative). Torus work involves temperatures and humidity changes and sometimes painting upside down. Use of lower cost poorly qualified painters is made to save money. CI believes that some of these painters may have no experience and their resumes are not correct." CX-73; TR 147. The report described the safety significance as: "Use of unqualified coatings could result in the lack of proper adhesion and paint peeling which would block ECCS suction strainers during design accident." TR 149. The report also reflected that Speegle did not want to be identified. TR 150.

Speegle verified that he received notice from the NRC that his allegation report was investigated and that his concerns were not substantiated. The NRC inspection found that the contaminated coatings special program activities satisfied acceptable requirements and that no violations or deviations were identified. RX-55, p. 16, 45.

Speegle testified that he did not know whether any management member at S&W knew he filed a complaint with the NRC. TR 341. Childers and Gero each testified that they were not aware of Speegle's visit to the NRC prior to his termination. TR 610, 1031.

3. Safety Meeting of Friday, May 21, 2004

At the Friday safety meeting, the issue was raised again. There was a heated debate, and Speegle clearly voiced himself. Speegle testified that he again asked why S&W was certifying apprentices and stated that the certification test was not acceptable. TR 154. He spoke out that the G-55 clearly states that journeymen painters are to do the painting in the Torus, and he asked how he could operate a crew with apprentices. TR 155. Childers again indicated that it was a dead issue and would not be discussed. TR 156. Speegle recalled that other painters muttered things to themselves about the situation, but he was the most vocal person at both the Thursday and Friday meetings. TR 156. Speegle testified that he brought up the issue more than other people. He described that when Childers addressed the issue, he was standing up over him, which Speegle perceived to be him addressing the fact that he kept bringing up the issue. TR 157. Speegle testified that after the Friday meeting he was concerned that his relationship with Childers was getting tense. Nevertheless, he intended to keep asking the questions until he got the answers. TR 157-158.

4. Safety Meeting of Saturday, May 22, 2004

Speegle testified that at the Saturday morning safety meeting, Childers asked Pat Ferrell, a fellow journeyman, to read a document that announced the changing of the G-55 to allow the term coating applicator to replace the term journeyman. TR 160-161. Speegle stated that he never saw the actual document, and Ferrell did not read the title of the document. TR 161. He testified that some of the painters were vocally upset. TR 162. He stated: "I told Childers that I did not feel like this was the proper thing to do." He testified that, at this point, he still believed that the paperwork had not really been changed yet and that a safety problem still existed.[11] TR 163.

Speegle testified that as the meeting was coming to an end, he rose from his chair and went to the other end of the table. He turned away from Childers, facing the lockers, and said, "If they're not going to go by the G-55 they need to take that paper and stick it up their ass because now we have nothing to work by." Speegle testified that this statement was not directed at anyone, but was just his opinion. He stated that he made the comment in a normal conversational tone.[12] TR 164-165. He testified that he did not think Childers could have heard his comment because there was a lot of noise going on after the safety meeting. TR 290. However, this testimony was impeached by his admission to the NRC agent that Childers probably heard his comment. TR 290-291. Speegle explained that at the moment he made the comment, he was thinking that S&W was undermining the G-55. TR 168. He testified that he never had any intention of disobeying procedures, and he did not say anything about disobeying procedures. TR 169-170. He estimated that he was eighteen to twenty feet away from Childers when he made the comment. TR 165-166. He then proceeded to his locker to get ready for work. TR 166-167. Speegle testified that he "may have" said at the Saturday meeting: "Thank you, you just gave all these people's jobs away." TR 319. He did not remember making the statement that journeymen were paid $17.00 per hour while apprentices were paid only $13.00 per hour, although he admitted it was possible that he said it. TR 319-320.

Childers testified that Pat Ferrell read the actual EWR at the Saturday safety meeting. After he read it, the painters started again with the same complaints. After ten to fifteen minutes, Childers finally said that as far as he was concerned the issue was over. TR 719. He testified that he had been dealing with the issue for three weeks, so he told them that this was the decision management had made and they would have to continue their concerns with Gero, Employee Concerns, the TVA or the NRC. TR 605-606. Childers testified that, at this point, Speegle got up from his seat and walked around to his locker, turned around to look at him, and said, "You and management can take that

[11] Ferrell testified that, as of the Saturday meeting, he also believed that the G-55 had not actually been changed yet. TR 504.

[12] In Speegle's amended complaint, he stated that he made the comment "under his breath and barely audible." TR 315-318.

G-55 and you can shove it up your ass." TR 606. Childers stated that there was a ripple effect of laughter. TR 712. Childers testified that he then stopped the meeting in order to diffuse the situation, and he left the trailer. TR 606, 716-717. Childers testified that nothing like Speegle's comment at the safety meeting had ever happened in his experience at Browns Ferry. He described it as "overwhelming" and "shocking." TR 609. He described Speegle's voice level as a loud, raised voice, rating it an eighty on a scale of one hundred. TR 714-715. Childers was sure that he heard him and was sure that this was what he said. TR 715. He felt at that moment that Speegle had made an insubordinate comment. TR 721.

Albarado, a Civil Supervisor at S&W, was present towards the end of the Saturday safety meeting. He walked in after the exception to the G-55 was read and sat down with the rest of the painters. TR 945. At that point he heard Speegle make his statement. Albarado testified that he heard him say, "Management can take the G-55 and shove it up their ass." He was ten to fifteen feet away from Speegle and described the volume level as a raised voice. TR 946. He concluded that Speegle was saying this statement to Childers because he was standing up facing Childers. TR 946. He testified that after Childers left, he heard someone say, "The next thing you know they'll have the laborers doing our job." TR 947.

Ballentine, who was a foreman of a Torus crew at that time, was present at the Saturday safety meeting and testified that Speegle was irate and told Childers that "[he] and upper management could shove the G-55 in their ass." TR 1011. He testified that Childers made the comment near the end of the briefing. TR 1012. He described Speegle's voice level as "medium tone," "not a low tone and not shouting," and "a little louder than a normal conversational tone." TR 1012. Ballentine also testified that after Childers left, Speegle said "F that bigheaded SOB" and "If they certify these apprentices, they will be sending our ass home." TR 1013, 1020. Ballentine testified that he interpreted Speegle's concern to be that apprentices would take the journeymen's jobs. TR 1018. Although, he also admitted that he heard Speegle say that the apprentices did not have experience applying coatings. TR 1019-1020.

Frazier was also present at the Saturday safety meeting. TR 512. He testified that he did not hear Speegle make the comment. TR 513. He testified that, after the meeting, as they proceeded to the Torus for work, Speegle told him he was going to be fired because he told Childers he was not going to follow the G-55 and that they could stick it up their ass. [13] TR 513-515. However, Frazier's testimony was impeached with a signed

[13] Frazier testified: "[M]e and James went on to the building and he started he told us, "They'll fire me today." And I said, "Why James?" and come to find out James had had a comment about the bible. He said I had a little words about those and I told someone I was not going to go with this bible and do what the bible said the procedure this was and told Sebourn to stick it up their ass. It wasn't just running, it was a conversation, you know and I didn't really know that James said this until later on and me and James went to work." TR 513.

statement, taken by Mr. Schwartz, where he wrote that he heard the May 22, 2004 statement when James said they could shove the G-55 up their ass and that he was standing ten to twenty feet away inside the trailer. Frazier testified that this was a false statement and that he did not remember hearing the comment, but Speegle told him about it. TR 531. His testimony was further impeached by the signed declaration typed by Speegle's attorneys. The statement stated that he was present when Speegle made the comment, and went on to read: "Speegle was trying to voice his concern about using apprentices to Childers when Childers cut him off and said, 'that's it, we're not going to talk about this anymore.' Speegle then said to no one in particular, 'well, if they're not going to follow the 55 they might as well stick it up their ass. It's just confusing people how to do things here.' This comment was made out loud, but not in a raised voice. This comment was made to Childers it was just said aloud in frustration." TR 532. Frazier maintained that this declaration was true; he stated that he did not hear all of the comment. He went on to state that he did not know if he heard any of it exactly because there was a lot of racket in the trailer and he was trying to keep peace. TR 534. He additionally told the Office of Inspector General that he heard Speegle's statement. TR 532-534.

5. *Complainant's Suspension*

After the Saturday morning meeting, Childers met with Joe Albarado to discuss the situation and they decided to call Gero at home. TR 948. Childers explained the occurrence and Speegle's comment to Gero, telling him that "Speegle had said that me and management could take the G-55 and shove it up our ass." Childers testified that Gero inquired as to whether Speegle had used the word "ass" specifically. Gero indicated that he inquired to make sure the statement had not been blown out of proportion. TR 1027. Childers told Gero that he thought the comment was insubordination. TR 726-727, 730. Albarado voiced his opinion to Gero that the statement was one of total disrespect and that Speegle should be terminated. TR 950. Gero advised them to suspend Speegle until Monday when he could further investigate. TR 606-608. Albarado and Childers concurred with this decision. TR 976, 992.

Childers and Albarado then sent for Speegle and the job steward, Donald Frazier. TR 608. Childers testified that when the two men entered the trailer, Speegle immediately began accusing him in a loud voice for the changes to the G-55 and the discontent among the painters. TR 609. Childers testified that he told Speegle he was being suspended for insubordination, and Gero had instructed him to do so. TR 731. He said that Speegle did not curse at him, but he felt physically threatened by him. TR 731.

Speegle also told him that he had a wife and three children and accused him of being un-Christian. TR 610-611. When Speegle and Frazier continued to argue and were not headed toward the gate, Childers called security to escort them. On the way out, Speegle was yelling at him about him having a wife and three kids.[14] TR 611.

Albarado also testified that Childers told Speegle he was being suspended for insubordination. TR 951. Albarado testified that during the ten to fifteen minute period in the trailer, Speegle did not mention anything related to nuclear safety, the G-55, or the use of apprentices. TR 952.

Speegle testified that he was working in the Torus, when he and Donald Frazier were summoned to Childers' trailer. TR 170-171. Childers and Joe Albarado were both present at the trailer, and Childers told him he was suspended. TR 172. Speegle stated that he asked Childers why he was being suspended and Childers replied, "Nobody's going to tell me to take the G-55 and stick it up my hind-end." TR 173. Speegle admitted that he did not try to explain his comment to Childers or tell him that it was not directed at him. TR 295-296. Speegle stated that he was shocked because this was the first time he was ever disciplined in his entire career. TR 173. He testified that he and Childers had a few words back and forth, and Childers called security. Speegle recalled that Frazier asked for paperwork, but none was given. TR 174.

6. Complainant's Termination

Speegle testified that he returned to work on Monday, May 24, 2004, and went to Employee Concerns to inquire about his status. He spoke with Fran Trest, the Human Resources Manager, telling her that he did not know why he was sent home because he did not receive any paperwork. TR 177-178, 297-299. She gave him a pen, paper and unoccupied cubicle outside her office and asked him to write a statement describing what happened. TR 300. His written statement included that he asked about the PER regarding the certification of apprentices and the G-55 and that when the meeting was over, he said, "[They] should stick the G-55 up [there] (sic) ass." RX-1; TR 304. His statement also included, "The G-55 has been changed so we do not no (sic) what to work to anymore." RX-1. After he gave his statement to Trest, he waited outside her office until she called him into the office and told him he was terminated for insubordination. TR 179.

Trest testified that on Monday morning, Speegle came into her office and asked for help because he had been suspended, did not know why, and did not have any papers. She found it strange that he did not know why he was suspended, so she asked him to make a written statement of the events. TR 821. She gave him a pen and paper and an

[14] Childers and Albarado testified that Speegle's behavior in the trailer was not a determining factor in his termination. TR 736, 979.

unoccupied cubicle outside her office. She gave him as much time as he needed. TR 821-822. While he was writing, she called Childers to inquire about the situation. Childers gave her a summary of the meeting and his perception of the comment. TR 822-823. Speegle then gave her his written statement, and she called Rick Gero. Gero indicated to her that he had decided to terminate Speegle's employment for insubordination. She then read Speegle's statement to Gero. TR 823. Trest verified that Gero discussed only the behavior exhibited on May 22 as a basis for termination. TR 824. Trest administered Speegle's termination. TR 820. Trest testified that Speegle never mentioned anything related to nuclear safety or that he thought he was being fired for raising nuclear safety concerns. TR 824-825.

Childers testified that when he returned to work Monday morning, Gero took his written statement regarding the events. See RX-4. He did not have any further involvement with disciplinary actions taken against Speegle. TR 611-612.

Gero testified that he made the decision to terminate Speegle's employment due to Speegle's indication that he intended not to follow procedures. TR 1026. On Monday morning, he conducted an investigation. He collected the written statements of Childers and Albarado and determined that their accounts matched. See RX-3, RX-4. He also talked to one painter who indicated that he believed Speegle's comment did not reflect that he would not follow procedures. Gero did not obtain statements from other painters present at the meeting. Based on his investigation, Gero decided to terminate Speegle for insubordination. TR 1027. He testified that he wrote only "insubordination" on the paperwork he sent to Fran Trest and that profanity had nothing to do with Speegle's termination. TR 1038-1039, 1100. Gero admitted that he had the option of demoting Speegle, but found that a demotion was inadequate given that Speegle had flat out refused to follow the G-55. He stated that he found this refusal grounds for termination, regardless of whether Speegle was a foreman or a regular journeyman. TR 1102. Gero testified that his decision to terminate Speegle was subject to the approval of a site manager, Brownie Harrison or Don Olsen, and Fran Trest had authority to recommend whether his decision should be approved or not. TR 1037, 1104.

D. Post-Termination

After he was terminated, Speegle sought employment by visiting his union hall, checking the newspaper two or three times per week, making phone calls, and looking for houses to paint. TR 185-186.

He stated that later in the year, his union sent him to the power service shop, which is an overall maintenance building that TVA uses to repair and recoat equipment. TR 186. After he had passed the drug test, he was told they did not need him anymore. He believes this was because he had a nuclear restriction against him. TR 187. A nuclear restriction is a ninety-day wait period before you can go to another TVA job, if

you have been fired. He stated that the union told him he had this restriction. TR 188-189. However, this testimony was impeached by his deposition testimony where he stated that he was told he was not qualified to do the blasting required for the job.[15] TR 369-370. He knew there were other jobs available at Browns Ferry and at another nuclear plant in Florida. He expressed interest in the work, but was not awarded it. TR 191.

The union eventually sent him on a job in Unit 2 at Browns Ferry on March 7, 2005. TR 191. The work was in the modifications area and was under different management. It was not a long-term opportunity, and lasted nearly one month. TR 192-194. The union next sent him on a one-week job on June 13, 2005. TR 194-195. He has painted a few houses, but knows of no opportunity for continued employment. TR 195.

E. Employer's Policies

1. Avenues for Raising Concerns

Trest testified as to the following mechanisms through which S&W employees can raise concerns: S&W Employee Concerns, TVA Employee Concerns, the NRC, Office of Inspector General, Human Resources, supervisors, S&W's Safety Department, and an anonymous corporate speak-up line. S&W also has an open door policy, which allows the employee to report problems all the way to the project manager. The PER process is an avenue employees can use to identify problems, which are then assigned to a responsible party to address. TR 818.

2. Work Rules and Regulations

Trest testified that S&W's Work Rules and Regulations are contained in a small blue book. See CX-21. She stated that they only use it as a guideline because employee conduct does not always fall within the work rules. TR 819. The book dictates that termination for "Insubordination to Supervisors or Foreman" means there is no opportunity for rehire unless the site manager or similar official approves it. TR 859; CX-21, p. 13. Trest admitted that supervisors interpreted the blue book differently, and employees had been disciplined differently for the same infractions. TR 858. S&W had been unable to enforce a policy of consistency, because they had not been tracking their disciplinary actions. Part of her job was to make S&W more consistent in their disciplinary practices. TR 857.

[15] Speegle explained that he gained new information since the time of his deposition, because he was called back to the jobsite one week later. TR 371.

3. *Definition of Insubordination*

Trest defined insubordination as "anything from refusing a direct order to being totally disrespectful, undermining your supervisor." She went on to say, "It has a lot of dynamics attached to it sometimes." TR 819-820. Trest testified that other employees have been disciplined, by termination or reprimand, for insubordination. TR 825-826. The severity of the discipline varies based on the particular dynamics of the insubordination. TR 826. To her knowledge, no employee at S&W has ever exhibited behavior similar to Speegle's conduct at the May 22 safety meeting. TR 826. She admitted that S&W management used the term insubordination in several different ways to cover different kinds of conduct. TR 857. Regarding profanity, Trest stated that S&W's expectation is that employees do not use profanities with each other and with supervisors, but the fact is that it often happens. TR 827.

Gero testified he could not give S&W's definition of insubordination, because it can mean different things to different people, and it is not contained in a written document. He defined insubordination as defiance and disobeying orders. TR 1097.

Childers testified that he defines insubordination as a total disregard of any authority or as disrespect to supervision. TR 778. He admitted that part of insubordination is the refusal to obey rules, instructions, or procedures. TR 781. Childers testified that he has recommended a number of employees for termination for insubordination, whether or not they used profanity. TR 755. He explained that sometimes profanity is part of the insubordination, but he has never disciplined someone for using profanity itself.[16] TR 755-756.

Speegle testified that he understood "insubordination" to mean disobeying rules or refusing to do the job. TR 180. He did not feel he had been insubordinate, because he had never refused to do his job or to comply with the G-55. TR 182.

F. *Employer's Rationale for Complainant's Termination*

Gero stated that he found Speegle's behavior at the May 22 meeting insubordinate because he indicated that he was not going to obey the rules and implied that, as a foreman, he would not enforce the G-55 with his crew. TR 1098. He testified that it was irrelevant whether Speegle made his comment in front of a small group of employees or a

[16] In Childers's statement to OSHA, he stated that he personally recommended numerous employees for termination for insubordination and profanity. TR 757. See CX-40. He testified that the use of profanity is a basis for disciplinary action depending upon how it's used. TR 759.

large group of employees.[17] TR 1041-1042. He testified that he did not need this type of leadership from a foreman. TR 1026-1027. Gero agreed that part of what informed his decision about the egregiousness of Speegle's conduct was the fact that the issue had already been addressed by a number of TVA and S&W experts and that Speegle was trying not to follow the rules given to him. TR 1048-1049. However, Speegle's continued disagreement with the experts was not part of the context of his termination. TR 1075. He stated that Speegle was still allowed to question the opinion of the experts, but he was not allowed to say he was not going to follow their decision. TR 1082. Gero found Speegle's refusal to accept the experts' decision. TR 1092. Gero believed that the comment alone was clear enough to show that Speegle had no intention of abiding by the letter of the law. TR 1077, 1092. Gero admitted that he never asked Speegle what he meant by his comment. TR 1077. Gero thought that Speegle was trying to lead the group into not following procedures. TR 1099. He admitted that Speegle was not the union hothead type. TR 1099.

Childers testified that Speegle's act of standing up at the meeting and his comment directed at him and management was the sole basis for his termination. TR 743. He felt that the statement was insubordinate procedurally and showed disregard for authority. TR 743-744. The termination was not based only on a vulgar word, but the intent of what he said directly to Childers about the procedures and management.[18] TR 745. Childers explained that he took Speegle's statement to mean that he intended not to follow procedures.[19] TR 763. Childers testified that Speegle's repetitively raising the issue was not part of what made his conduct on May 22 insubordinate. TR 770-771. Childers testified that the history of Speegle's complaints did not have any bearing on his determination that Speegle was insubordinate. TR 774. He testified that Speegle's continual raising of complaints had nothing to do with his termination. TR 775. At his deposition, Childers testified that he interpreted Speegle's comment to mean that he would not follow procedures, based upon his attitude towards the G-55 and towards upper management and based upon the history of his complaints. TR 773.

Trest agreed that Speegle was terminated for insubordination that included profanity. TR 828. When presented with S&W's position statement to OSHA, which cited insubordination and foul language as grounds for termination, she asserted that the corporate office inserted "foul language" as a basis for Speegle's termination, but

[17] Gero then agreed that if Speegle had said, "If upper management is not going to follow the G-55 they might as well stuff it up their ass," that would not have been grounds for termination. TR 1044. However, if Speegle said: "You can keep your G-55," that would be grounds for termination. TR 1079.

[18] Childers later testified that the use of the word ass had nothing to do with the termination. TR 763-764. However, in his deposition testimony, Childers agreed with the company's position statement provided to OSHA, which cited insubordinate attitude and foul language as the grounds for termination. TR 749.

[19] Childers testified that if Speegle had said, "If they're not going to follow the G-55 then they might as well stick it up their ass," that would be grounds for termination. But, if Speegle had said, "This company is making a mockery of the G-55, . . . if they're not going to follow that they might as well throw it in the trash," it would not have been grounds for termination. TR 795-797.

maintained that Speegle was fired for insubordination that included profanity. TR 832; See CX-48, p. 297. Complainant's counsel posed several hypothetical comments to Trest, inquiring as to which would have been grounds for termination for insubordination. Trest's responses indicated that any statement amounting to an intention not to follow the G-55, whether the statement included profanities or not, would have been grounds for termination. TR 834-844. Trest admitted that Speegle never actually said he was not going to follow procedures and that she never asked him what he meant by his comment. TR 844. Trest wrote a statement describing the events of May 24, 2004, which included that Speegle told her that he said management "could stick the G-55 up their ass." See RX-2. She admitted that she did not write in her statement that she believed Speegle intended not to follow procedures or that Gero indicated to her that he could not keep an employee who said he was not going to follow the rules. TR 846.

Trest testified that she told OSHA that Speegle's concerns were simply union concerns. TR 849. However, she admitted that this belief was based on Speegle's lone comment to her that "You could get a laborer to do it."[20] TR 850-851. She did not know if Speegle raised nuclear safety concerns to his supervisors or if he went to the NRC with similar concerns. TR 849. She admitted that even if Speegle's concern had a union component, she did not know whether he was concerned with nuclear safety. TR 856.

G. Disciplinary Actions Against Other Employees

Trest testified that the Human Resources database documented six S&W employees who were terminated for insubordination: Charles Rowland, Dennis Wilkinson, James Parker, James Jones, Santo Chiodo, and James Speegle. TR 866. She did not know any information surrounding the termination of Charles Rowland. TR 866. Childers and Gero originally terminated Dennis Wilkinson for dishonesty. The circumstances were that he violated a work rule by leaving the work grounds and lied to his supervisors about it. TR 867. Trest later overruled the grounds for termination and changed it to insubordination, because she felt it better reflected the circumstances. TR 898. James Parker was originally fired for insubordination, but Trest changed it a year and a half later to unsatisfactory work when she investigated the facts. TR 869. James Jones was terminated for insubordination based on screaming profanities at his supervisor in front of three or four employees. TR 871. He additionally called a top Shaw official a moron and sent many letters about all levels of S&W management and his co-workers, in which he called a lot of people horrible names. S&W sent him a letter and asked him to cease and desist, warning him that if he did not, he would be dealt with. Once Jones acted out again, he was fired. TR 873-877. Santo Chiodo was fired for a second offense

[20] Trest admitted that it was possible his comment could have meant that, under the procedures S&W was following, someone with no painting experience could qualify for Torus work. TR 851.

of insubordination. His first offense involved lashing out at his foreman in front of his peers using vulgar language. He received a final warning letter for this activity, warning him that such outburst would not be tolerated. He engaged in another outburst in November 2004, which resulted in his termination. TR 877-879.

Trest maintained a reprimand log that reflected that five individuals had been disciplined for insubordination. These individuals received suspensions. TR 882. Trest stated that none of the employees terminated or reprimanded for insubordination were engaged in the same conduct as Speegle. TR 894.

Cook testified that he has heard profanity at safety meetings numerous times. TR 231. He has heard workers cuss and use vulgarities directed at foreman and Childers and he does not know of disciplinary action taken against them. TR 232. He specifically recalled an instance when Cecil McCoy used the "F" word with Childers and was not disciplined. TR 267-272.

Ralph Thompson testified that Childers demoted him on an occasion when he used profanity towards him. The situation arose when Childers approached Thompson in reference to actions he took that were a safety violation. Thompson felt that he had good reason for his actions and told Childers, "I don't want to hear this F-ing BS." He said it directly to Childers, but no one else was around. Childers demoted Thompson. However, Thompson's shift supervisor reinstated him two days later. TR 434. Gero also recalled this occurrence and stated that Childers wanted to terminate Thompson. Gero decided to remove him as the lead general foreman, because he thought that termination was too extreme for this one-on-one conversation. TR 1100-1102. Childers testified that he felt Thompson had been insubordinate in that he refused to comply with safety instructions and recommended that he be terminated. TR 780. He testified that although Thompson's situation was similar in part to Speegle's situation, the difference was that Thompson did not make his comment in a crowd of employees and was not trying to upset other employees.[21] TR 722.

H. Character Evidence

1. Complainant's Reputation

Childers testified that Speegle was an exceptionally good craftsman who was professional about his work and that he was one of his better foremen. He has never known Speegle to disobey any work rule or to deviate from the G-55 while working

[21] In his OSHA statement, dated September 2, 2004, Childers stated that he recommended Ralph Thompson for termination for a situation similar to Speegle's. CX-39, p. 316.

under him. TR 767-769. He does not know of any disciplinary action against Speegle other than the dosimeter warning.[22] TR 769-770.

Smith testified that Speegle is well liked and a very good painter. TR 467. She described him as safety-conscious and stated that it was typical for him to voice his opinion when a coating was applied incorrectly. TR 468. Frazier testified that Speegle is one of the best painters on the job and takes pride in his work. TR 507. He also described Speegle as very safety conscious. TR 508. Atkinson testified that he observed Speegle to be an excellent painter and excellent foreman. He stated that Speegle always followed procedure, has an excellent reputation, and is conscientious and knowledgeable. TR 551-552. Coggins also testified that Speegle had a good reputation at the plant. TR 417.

Angie James, a PER writer at Browns Ferry, testified that Speegle told her on two occasions that he thought he was going to make millions off of the lawsuit. TR 999-1001. She testified that on one occasion she ran into him in an office and they had a conversation where he said that his lawsuit was looking good for him and it would make him a million. TR 1002. On the second occasion, she was at her desk in the Civil Trailer, and Speegle came there to look for someone else. She testified that they had a similar conversation. TR 1003. These incidents occurred in the first week of March 2005. TR 1004. She testified that Garry Gentz[23] asked her to send an email to Fran Trest regarding these comments, which she sent on March 23, 2005. TR 1004, 1007. James could not recall how Garry Gentz obtained knowledge of the conversations. She thought either someone observed Speegle speaking with her or she told someone about the conversations. James admitted that she did not think Speegle's comments to be misconduct and that she would have reported it herself if she would have thought such. TR 1006. She also admitted that she did not know if Speegle was joking or not. TR 1008.

Speegle testified that he never had the conversations described by Angie James. TR 1110. He stated that he had contact with James in March 2005, when he was called back to work in Unit 2. He went to see James regarding a PER he had written, unrelated to the present case. He testified that he inquired about the PER and meanwhile, Gary Gentz came out of his office and told him that he needed to leave the trailer. TR 1112-1113. Speegle testified that he did not say anything to James about his case.[24] TR 1115.

[22] Speegle received a warning from Gero in January 2004 for leaving a controlled area while wearing his dosimeter. Speegle testified that his action was the result a rule change of which he was unaware at the time. TR 384. Speegle testified that he has never received any reprimand other than the dosimeter warning. TR 400.

[23] Gary Gentz is Gero's replacement as Civil Superintendent. TR 1007.

[24] At an earlier point in the hearing, Speegle testified that James asked him how the case was going, and he told her that it looked like things were moving along. TR 374.

He recalled that James asked how it was going, and he said it looked like he might be back to work soon. TR 1115. He insisted that he did not tell her that he thought the case could make him a millionaire. TR 372-373. Speegle testified that he does not believe that the case can make him a millionaire. TR 1116.

2. Childers's Reputation

Two of Complainant's witnesses testified that Childers made a threat to lay off employees who were helping Complainant's case. Cook testified that sometime after Speegle's termination, he was on a smoke break with Childers and Wayne Coggins, when Childers brought up the fact that Stone & Webster had hired attorneys for him in the present case. Cook testified that Childers said that when he finds out who has anything to do with helping Speegle's case; he would take care of them. Cook testified that he felt intimidated, because he had helped with Speegle's case. TR 242-244. Cook also testified that he was laid off from his job in March 2005 when S&W took the contract from Williams Power. TR 246. He testified that Childers told him he was laid off because he was on the Williams layoff list. He stated that he viewed the list, and his name was not on the list and that, as a union steward, he should have been the last one to be laid off.[25] TR 248.

Coggins testified that he overheard the conversation between Childers and Cook. TR 404-405. He heard Childers say that he thought some people were helping Speegle and if he found out who they were, he would "take care of it."[26] Coggins perceived this statement to mean that Childers would lay the person off. TR 405. Coggins acknowledged that Childers told him that attorneys were defending him against Speegle's claims and that employees were telling lies about him in the proceeding. TR 413. He then admitted that it was possible that Childers said that his attorneys would take care of those people. TR 414. Coggins also stated that he was concerned about testifying for fear that Childers could lay him off. TR 404.

Childers recalled the conversation with Cook and Coggins behind the paint shop, but denied making a threat. TR 644. He stated that Cook began asking him questions about the case during a smoke break. He had been instructed by Employee Concerns not to say much about it, so he told Cook: "Stone & Webster has hired me attorneys, they're going to check into this matter and the NRC and the IG is investigating. They're going to find out who's lying. If it's perjury for me, it's perjury for them also . . . they're going to find out who is at fault here." Childers stated that he did not say that he would "take care

[25] Cook's testimony about actually seeing the layoff list was impeached by his written declaration where he stated that a Williams Power supervisor and Mike Cromwell had told him that he was not on the list. TR 283. Additionally, Cook acknowledged that only the official daytime steward is guaranteed job protection. TR 278.

[26] Coggins's written declaration says that Childers told him this statement, rather than overhearing the conversation. TR 415.

of" whoever was assisting Speegle. TR 644. Childers testified that at the time of Cook's layoff, he was not aware that Cook had provided statements or written declarations in the present case. TR 645. He testified that when S&W took over from Williams Power, Albarado and Gentz chose whom to lay off. TR 645.

Cook, Smith, and Atkinson gave additional testimony regarding Childers's character. Cook testified that he was demoted from his foreperson position and he believes that part of the reason was because he complained to Childers about Material Safety Data Sheets and subsequently refused to do work with his crew on that basis. TR 263. He stated that he spoke to Employee Concerns about this belief, but did not file a complaint with the union. TR 263-264. Cook admitted that when he was demoted, Jim Henard, the Nightshift Civil Superintendent, told him that it was because he was being too negative. TR 262.

Smith testified that she is fearful of being laid off by Childers for her testimony at the hearing. TR 460. She also described an instance when Childers threatened the painters who did not want to work overtime, by telling them they could be placed higher on the layoff list. TR 459. Childers denied making this threat. TR 798-799.

Atkinson testified that when some of S&W's painters were on loan to General Electric, Childers filled out timecards charging time to General Electric for time that was actually spent doing work for S&W. He testified that Jackie Dudley challenged Childers about the timecards, and Childers became very irate. Atkinson stated that Jackie Dudley was eventually removed from his foreman position. TR 560-561. Childers testified that he never directed Dudley to charge his time on an unauthorized account nor to falsify his time records. TR 651. Atkinson testified that he would not return to work under Childers's command, because he feels that Childers is not qualified for his position, instructs painters to do things that violate procedure, and will lay off or fire a painter who disagrees with him. TR 564.

I. Damages

Speegle seeks job reinstatement, back pay compensation, and compensation for emotional distress. TR 209. Speegle testified that his gross income from January 1, 2004 though May 22, 2004 from Shook & Fletcher was $17,587.41, and his gross income from Stone & Webster was $2,719.04, for a total of $20,306. Based on these figures, he projected that if he had not been terminated, his yearly income would have equaled $48,734.40. He calculated that through the date a week after trial, he would have earned $52,900. TR 197-198. Speegle testified that he received $4.80 per hour in health insurance and retirement benefits for each $18 per hour wage. TR 211. He testified that he worked sixty to seventy hours per week, and he was paid double time on Saturdays. TR 212. He testified that once Williams Power took over, all painters were required to work seven days per week, twelve hours per day. TR 212.

Speegle estimated that he received $4200 in unemployment, $2500 for a house he painted for Lendon Davenport Builders, $1750 and $1620 for two houses painted for E.S. Robbins, $3000 for an insurance job, $4500 from the March 2005 job at Browns Ferry and $1500 from the June 2005 job at Browns Ferry. TR 199-201. He has received $244 per month in food stamps for past five or six months. TR 206.

Speegle testified that the loss of his job has caused him humiliation because he can no longer support his family in the lifestyle to which they are accustomed. TR 203-205. He testified that he can no longer afford health insurance for himself and his family. TR 205. He stated that he no longer retains the financial means to socialize with his friends. TR 206. He testified that he has trouble sleeping and lacks self-esteem. TR 207.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. Frady v. Tennessee Valley Authority, 92-ERA-19, slip op. at 4, (Sec'y, October 23, 1995). As the trier of fact, the Court may accept of reject all or any part of the evidence and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). To the extent that credibility determinations must be made, the Court bases its credibility findings on a review of the entire testimonial record and exhibits, with due regard for the logic of probability and the demeanor of the witnesses.

LEGAL ANALYSIS OF WHISTLEBLOWER CLAIM

The employee protection provisions of the Energy Reorganization Act prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. 42 U.S.C. §5851. The Court must determine whether the complainant has proven, by a preponderance of the evidence, that the complainant engaged in protected activity under the ERA, that the respondent knew about this activity and took adverse action against the complainant, and that the complainant's ERA-protected activity was a contributing factor in the adverse action that was taken. Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003); Paynes v. Gulf States Utilities Co., ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB Aug. 31, 1999); Dysert v. Secretary of Labor, 105 F.3d 607 (11th Cir. 1997). If the complainant meets this burden, the respondent must demonstrate by clear and convincing evidence that it would have taken the same

unfavorable personnel action in the absence of the protected activity. Kester, ARB No. 02-007. Examining the respondent's burden of proof is typically referred to as "dual motive" analysis, and it need only be reached if the complainant proves that the respondent fired him in part because of his protected activity. Id.

The Court applies the framework of burdens developed for pretext analysis under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. See Overall v. TVA, ARB Nos. 98-111 and 98-128, ALJ No. 97-ERA-53, slip op. at 12 (ARB Apr. 30, 2001) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 450 U.S. 502 (1993); Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000), rev'g 197 F.3d 688 (5th Cir. 1999)). Under this framework, a complainant must first create an inference of unlawful discrimination by establishing a prima facie case of discrimination. Id. (citing Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 933-934 (11th Cir. 1995). The burden then shifts to the employer to produce evidence such that a reasonable adjudicator would accept that it took adverse action for a legitimate, nondiscriminatory reason. Id. If the employer is successful, the inference of discrimination disappears and the complainant then assumes the burden of proving by a preponderance of the evidence that the employer's proffered reasons were pretext for discrimination. Id. at 13. Overall, ARB Nos. 98-111 and 98-128, slip op. at 13, citing Reeves v. Sanderson Plumbing, 530 U.S. 133, 147-148 (2000). The ultimate burden of persuading that the Respondent intentionally discriminated against Complainant remains at all times with Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. at 502.

Since this case was fully tried on the merits, it is not necessary to determine whether Complainant presented a prima facie case. See Carroll v. Bechtel Power Corp., ALJ No. 91-ERA-46, slip op. at 11, n.9 (Sec'y Feb. 15, 1995), aff'd sub nom Bechtel Corp. v. U.S. Dep't. of Labor, 78 F.3d 352 (8th Cir. 1996). Once the respondent has produced evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, by burden of production, it no longer serves any analytical purpose to answer the question whether the complainant presented a prima facie case. Instead the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. Eiff v. Entergy Operations, Inc., ARB No. 97-022, ALJ No. 96-ERA 42 (ARB Oct. 3, 1997). In the present case, the Court finds that Respondent has articulated a legitimate, nondiscriminatory reason for its actions, based on Gero's testimony that he fired Complainant for his insubordinate comment at the May 22, 2004 safety meeting. Therefore, the Court will proceed to examine whether Complainant engaged in protected activity, known to Respondent, and whether his protected activity was a contributing factor to Respondent's adverse action against him.

I. Complainant's Protected Activity and Respondent's Knowledge

Complainant asserts that he engaged in protected activity when: (1) he complained to Childers about moving crews from bay-to-bay in the Torus; (2) he complained to Childers about repairing only failed coatings and not mechanical damage; (3) he complained to Childers about certifying apprentices to apply coatings inside the Torus; (4) he reported his concern regarding the certification of apprentices to the NRC; and (5) he made a comment about the G-55 following the May 22, 2004 safety meeting. Respondent contends that these alleged complaints do not constitute protected activity. Respondent argues that S&W's work practice of moving from bay-to-bay was management prerogative not covered by the ERA and that the repair of mechanical damage was outside the authorized scope of work for the Torus project. Respondent argues that any complaints about the certification of apprentices were too attenuated to constitute notice to S&W of a potential nuclear safety violation and that it was not aware of Complainant's visit to the NRC. Respondent contends Complainant did not express a nuclear safety concern through his comment following the May 22, 2004 safety meeting and that the comment was purely misconduct on his part.

The ERA protects activities that further the purpose of the statute, including notifying the employer of an alleged violation of the Act, refusing to engage in any practice made unlawful under the Act, testifying regarding any provision of the Act, commencing any proceeding under the Act, and testifying or participating in any such proceeding. 42 U.S.C. §5851(a). The Administrative Review Board ("ARB") has stated that a safety concern may be expressed orally or in writing and may be in the form of an internal and informal complaint. Id. at 18; Bechtel Construction, Inc., 50 F.3d at 931. The concern must be specific to the extent that it relates to a practice, condition, directive or occurrence. Williams v. Mason & Hanger Corp., ARB No. 98-030, ALJ Nos. 97-ERA-14, 97-ERA-18, 97-ERA-19, 97-ERA-20, 97-ERA-21 and 97-ERA-22, slip op. at 18 (ARB Nov. 13, 2002). The whistleblower must reasonably believe that compliance with the applicable nuclear safety standard is in question. The whistleblower need not cite a particular statutory or regulatory provision or safety procedure to establish a violation of such standard. Id. However, the employee's complaints must implicate safety definitively and specifically. See Bechtel Construction, 50 F.3d 926 (finding that a carpenter's questioning of his foreman about the procedures for protecting radioactive tools was protected activity because he raised particular, repeated concerns about this safety procedure that were tantamount to a complaint); see also Am. Nuclear Resources v. U.S. Dept. of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998). Additionally, a whistleblower must show that an employee with authority to take adverse action knew of the protected activity. See Mosley v. Carolina Power & Light Co., ALJ No. 94-ERA-23, slip op. at n.5 (ARB Aug. 23, 1996). An employee with knowledge who has "substantial

input" into the decision to take adverse action against the complainant is sufficient to demonstrate that the employer was aware of the protected activity. Id. An employee with "substantial input" includes an employee who reports the alleged basis for the adverse action to the decision maker. Kester, ARB No. 02-007, slip op. at 4.

The Court finds that the record does not contain sufficient evidence to establish that Complainant engaged in protected activity, known to Respondent, when he complained to Childers about moving the crews from bay-to-bay, when he complained to Childers about failing to address mechanical damages, and when he filed a formal complaint with the NRC. Childers confirmed that Speegle complained to him about the work practice issues, but testified that he did not communicate them as safety concerns. TR 635-636. Speegle testified at the formal hearing that he believed the movement from bay-to-bay increased the likelihood that a spot would be missed, but could not recall if he presented it to Childers as a safety risk. TR 346. Childers described the movement of crews as necessary in coordinating the various stages of activity in the Torus project. TR 637-639. Speegle's testimony regarding the failure to address mechanical damage revealed that he believed repairing both types of spots at the same time would be more efficient. TR 351. However, Childers explained that the scope of work called for the mechanical damages to be addressed at a later date under different funds. TR 351. The Court finds that the work activities of which Speegle complained were management prerogative concerning the manner in which S&W chose to carry out the Torus project. Speegle's complaints did not point to any definitive safety violation and, thus, did not amount to internal safety complaints under the ERA. Further, the Court finds that S&W was unaware of Complainant's formal complaint to the NRC. Childers, Trest, Albarado, and Gero each testified that they had no knowledge of Speegle's visit to the NRC, and the Court found their testimonies credible on this point. TR 610, 849, 954, 1031.

The Court finds that the record contains evidence sufficient to establish that Complainant engaged in protected activity, known to Respondent, when he complained to Childers about the certification of apprentices. Unlike Speegle's other activities, this complaint implicated a concern about deviating from specific safety-related procedures. Speegle testified that he was concerned about the certification of apprentices because he believed it to be in direct violation of the requirements of the G-55 Specification. TR 136-138. The G-55 Specification contains requirements for the application of protective coatings inside the Torus, which it references as a "safety-related coating system," and, at that time, contained language stating that journeyman painters were to apply these coating systems. RX-23, p. 10. The testimonies of Speegle, Thompson, and Smith evinced that the connection between nuclear safety and the proper application of the "safety-related coating system" inside the Torus was common knowledge at S&W. TR 55, 427, 453. Each of these painters demonstrated an understanding that a coatings failure could cause chips to clog the pumps or strainers, preventing safe shutdown and impeding water flow from the Torus in the event of an emergency. Id. The Court finds it clear that the G-55's requirements regarding the qualifications of coating applicators is

based on the importance of the proper application of the coatings to nuclear safety. Therefore, contrary to Respondent's arguments, the Court finds that Speegle's concern was not too attenuated to constitute notice to S&W of a potential safety violation. TR 125, 136-138, 360. Moreover, Gero and Childers each testified that Speegle communicated to them that he was concerned that apprentices were not capable of applying the coatings and that their certification would violate the G-55. TR 661-662, 1028-1029. Gero admitted that this type of concern is linked to nuclear safety. TR 1028-1029.

The Court additionally finds that Speegle reasonably believed that the certification of apprentices constituted a violation of nuclear safety standards. Speegle relied on the language in Appendix A of the G-55, which was entitled, "Qualifications of Journeyman Painters for Coating Service Level I Areas of Nuclear Power Plants." RX-23, p. 36. Speegle believed that Appendix A mandated that only journeymen painters were to apply safety-related coatings, and he based this belief on the terminology used in the G-55. TR 136-138. Even Childers originally took the same position on the issue under the same rationale. TR 590. At the hearing, Childers agreed that Speegle's belief that apprentice certification was a violation of the G-55 was reasonable for some amount of time. TR 662-664.

Complainant additionally alleges that his complaint regarding the certification of apprentices included a complaint that the testing procedure used to certify the apprentices was inadequate. He testified that he complained to Childers that the use of a flat panel test was incorrect and that cheating took place during testing. TR 125, 360. However, Childers testified that Speegle never complained to him that the test was unsatisfactory in any way. TR 629. The Court credits Childers' testimony on this issue, given that he was forthright in acknowledging that Speegle complained about the certification of apprentices. Speegle neither described the specific instances when he complained to Childers about inadequate testing nor presented any witnesses to corroborate the fact that he voiced this concern. Accordingly, the Court finds Respondent unaware of Speegle's complaints regarding inadequate testing.

The Court lastly addresses whether Complainant's comment at the May 22, 2004 safety meeting was protected activity. Complainant asserts that the comment itself expressed a concern about S&W's disregard for nuclear safety and that the Leeway Doctrine affords statutory protection to his comment because it was impulsive and was intertwined with his protected activity. Respondent argues that the comment did not express a nuclear safety concern and that, even if the comment was linked to his protected activity, employers may discipline their employees for inappropriately expressing legitimate safety concerns. The Leeway Doctrine allows some leeway for impulsive behavior when engaged in statutorily-protected activity; however, this leeway is balanced against the employer's right to maintain order in its business by correcting insubordinate acts. See Kenneway v. Matlack, Inc., 88-STA-20 (Sec'y June 15, 1989). It

applies to situations involving "impulsive conduct incidental to the protected activity where the complainant is emotionally motivated" and where the "conduct is temporary and uncalculated." Harrison v. Roadway Express, Inc., ARB No. 00-048, ALJ No. 99-STA-37 (ARB Dec. 31, 2002), aff'd on other grounds, Harrison v. ARB, 390 F.3d 752, 759 (2nd Cir. 2004).

The circumstances surrounding the comment made by Complainant following the May 22, 2004 safety meeting are the seminal factual dispute in this case. Respondent maintains that the comment serves as its basis for its legitimate termination of Complainant for insubordination, whereas Complainant alleges that his termination based on this comment was pretext for discrimination. Accordingly, the Court must resolve the factual differences before determining whether the comment was protected activity.

First, the Court finds the entirety of the testimony at the hearing in agreement that the Saturday, May 22, 2004 safety meeting included a reading of a document reflecting the official change of the terminology of the G-55, which allowed the certification of apprentices. TR 160-161, 719. Discussion and complaints from the painters ensued. TR 162, 719. However, at this point, the parties' stories diverge. Respondent asserts that Speegle rose from his chair, walked to his locker, turned to face Childers and said in a loud voice, "You and management can take that G-55 and you can shove it up your ass." Complainant argues that he did not direct his comment at anyone in particular, used a conversational tone, and said, "If they're not going to go by the G-55, they need to take that paper and stick [it] up their ass, because now we have nothing to work by." TR 164-165.

Factually, the Court accepts Respondent's version of the events. The Court bases this finding on the consistent testimonies of Childers, Albarado, and Ballentine, which recalled similar accounts of the statement and verified that Speegle directed it at Childers in a raised voice. TR 606, 714-715, 946-947, 1011-1012. The Court also finds Speegle's handwritten statement to be in harmony with Respondent's version. When given the opportunity by Fran Trest to document his recollection of the events, he wrote, "I said (they) should stick the G-55 up (their) ass." RX-1. Despite the presence of numerous co-workers at the meeting, Complainant did not present any witnesses that corroborated his version of the events. The Court found the testimony of Donald Frazier to be unreliable due to various inconsistencies. At the hearing, he first testified that he did not hear the comment and that Speegle told him about it after the meeting. TR 513-515. However, this testimony was impeached by two written statements where he indicated he heard the comment. TR 531-532. He later testified that he heard some of the comment, but not clearly due to noise in the trailer. TR 534. The Court finds Complainant's version further discredited by his inconsistent statement in his amended complaint that he made the comment under his breath and barely audible, rather than in a conversational tone. TR 315-318.

The Court finds that Speegle's comment was impulsive, as it was a reaction to the announcement of the official change in the G-55. While the comment may have been incidental, in part, to his protected activity regarding apprentice certification, the Court finds that the comment was not statutorily protected for two reasons: (1) the record contains evidence that union concerns were also prevalent in Speegle's response and (2) S&W's right to discipline insubordinate acts outweighs the allowable leeway for impulsive behavior in this instance. The record reveals that union concerns were a large part of the apprentice certification issue amongst the journeymen. Childers testified that he received several complaints that apprentices would take journeyman positions. TR 602-603. Frazier, the job steward, testified that journeymen approached him with concerns that the certification of apprentices could lead to job losses. TR 536. Ferrell testified that journeymen were concerned because there were uncertified journeyman painters who could have fulfilled the need. TR 487-488. More importantly, the record indicates that Speegle responded to the official change out of union concerns. He admitted that he may have said, "Thank you, you just gave all these people's jobs away," at the May 22, 2004 meeting. TR 319. Additionally, Ballentine testified that he heard Speegle say, "If they certify these apprentices, they will be sending our ass home." TR 1013, 1020. The Court cannot view Complainant's comment in isolation of this background and finds that his union concerns contributed to his impulsive comment. The Court also finds that Respondent had justification for disciplining Speegle for this comment in the interest of maintaining order. Speegle made this comment in the presence of a room full of subordinates, in a manner that was clearly vulgar and disrespectful. ARB case law holds that a protected employee who is insubordinate or oversteps the bounds of conduct is not automatically absolved from the misbehavior and may be disciplined by the employer. See Sayre v. VECO Alaska, Inc., ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005); Abraham v. Lawnwood Regional Medical Center, ARB No. 97-031, ALJ No. 1996-ERA-13 (ARB Nov. 25, 1997). Based on the foregoing, Speegle's comment at the May 22, 2004 safety meeting is not protected activity under the Act.

In conclusion, the Court finds that Complainant engaged in protected activity, known to Respondent, only when he made internal and informal complaints regarding the certification of apprentices to Childers and Gero.

II. Adverse Action and Causal Relationship

Respondent, S&W, took adverse employment action against Complainant when it suspended him on May 22, 2004 and ultimately terminated him on May 24, 2004. The Court will now examine Complainant's burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's adverse action against him. See Kester, ARB No. 02-007. Complainant first argues that he has satisfied the causation element by presenting direct evidence of retaliatory animus in the form of overtly hostile conduct. See Dillard v. Tennessee Valley Authority, 90-ERA-31

(Sec'y July 21, 1994); Bartlik v. Tennessee Valley Authority, 88-ERA-15 (Sec'y June 24, 1992). He asserts that Childers engaged in overtly hostile conduct when he "cut him off" during his questions about the G-55 and when he told him to "keep his big fat mouth shut." TR 140-143, 222-225. Complainant also asserts that Childers' testimony that his "history" of complaints was a factor in his view of Complainant's conduct demonstrates animus. TR 779. He cites Childers' description of the painters as "vicious" and "bitter," and Cook and Coggins' testimony that Childers told them he would "take care of" anyone helping Speegle in the proceeding. TR 243, 405, 669. Complainant asserts that Gero demonstrated animus when describing the painters as "arrogant" and when he testified that he feared Speegle would lead a rebellion. TR 1073-1074, 1099. Complainant lastly asserts that Gentz's conduct of ordering him to leave the trailer is evidence of S&W's animus towards him. TR 1113-1114.

The Court finds that Complainant did not present direct evidence of retaliatory animus. Direct evidence is evidence such that an explanation, inference, or presumption is not required to link it to the adverse action. For example, the ARB considered a supervisor's statement that he would prefer not to supervise an employee who had engaged in protected activities to be admitted animus against the employee. See Trimmer v. Los Alamos National Laboratory, ARB No. 96-072, ALJ Nos. 93-CAA-9 and 93-ERA-55 (ARB May 8, 1997). The Eleventh Circuit supported a finding that a manager's remark that he wanted the complainant transferred because he was a "troublemaker" and was like "Moses standing at the Red Sea to the ironworkers" was direct evidence of animus. Stone & Webster, 115 F.3d 1568, 1574 (11th Cir. 1997). In the aforementioned cases, the employer made an explicit connection between the adverse action and the complainant's activities. In the present case, neither Gero nor Childers made a declaration showing they sought to retaliate against Speegle for his protected activities. The Court will, therefore, consider the instances offered by Complainant as circumstantial evidence of Respondent's animus towards him.

First, the Court finds that Childers' conduct towards Speegle of cutting him off and telling him to "keep his big fat mouth shut," do not raise an inference of causation.[27] The record establishes that Childers had addressed the apprentice certification issue numerous times to the full extent of his authority throughout an extensive two to three week period. TR 125. He told the journeymen he could do nothing further and they should pursue higher avenues of complaint. TR 666-668. Given the events of the preceding weeks, the Court finds Childers' behavior to be that of irritability and impatience towards Speegle and not suspect evidence of animus. Second, Childers' testimony that Speegle's history of complaints regarding the G-55 influenced his interpretation of the statement that management could "shove it" does not implicate a

[27] Cook and Smith corroborated Speegle's testimony that Childers cut him off at the Thursday safety meeting when he was raising concerns about the certification of apprentices, saying, "this is the end of it." TR 138-140, 224, 456-457. Cook corroborated Speegle's testimony that Childers' told him "he should not be opening his big fat mouth." TR 142-143. TR 224. However, Childers denied making this statement. TR 604.

causal relationship between his protected activities and termination. TR 779. Childers is not disallowed from considering Speegle's complaints in discerning the context of his insubordinate act. Third, the instances of Childers' conversation where he allegedly said he would "take care of" those helping Speegle and of Gentz ordering Speegle to leave the trailer, both took place after Speegle's termination. Accordingly, these events do not weigh in favor of causation, but could arguably establish evidence of Respondent's lingering hostility towards Speegle. The Court finds that while the testimony establishes that a conversation regarding the pending case took place between Childers, Cook and Coggins, the Court is not convinced that the content of the exchange consisted of threats made by Childers. However, the Court will weigh the totality of this evidence in evaluating Complainant's burden. Fourth, the Court finds that Gero's description of the painters as "arrogant" does not show hostility towards Speegle in particular. Lastly, Gero's testimony that he thought Speegle was trying to lead the group into not following procedures is simply his interpretation of the events and does not show animus on his part.

As a whole, the Court finds that Respondent was not hostile towards Speegle in the events leading up to his termination. While Childers exhibited his temper and frustration with the issue, he also testified that Speegle had the right to approach him with complaints and to go to other sources with his complaints. TR 775-776. Further, once Childers gave his written statement of the events to Gero, Childers had no further involvement with Speegle's discipline. TR 611-612. The record is clear that Gero alone made the decision to terminate Speegle, and the Court finds no evidence of hostility exhibited by Gero. The record additionally establishes that no painter was retaliated against for participation in related proceedings. Based on the foregoing, the Court does not find evidence of retaliatory animus on the part of Respondent.

Complainant next argues that the record contains further circumstantial evidence sufficient to establish that his protected activity was a contributing factor to his termination. He relies on the temporal proximity between his protected activity and termination, the disparate treatment he received compared to other employees who engaged in similar conduct, S&W's disregard for nuclear safety, S&W's shifting justifications for his termination, and the merits of his protected complaints.

A. Temporal Proximity

In whistleblower cases, temporal proximity is commonly found sufficient to raise an inference of causation. However, when an intervening event reasonably could have caused the adverse action, the inference of causation is compromised. Tracanna v. Arctic Slope Inspection Service, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001). The Court finds that the temporal proximity between Complainant's protected activity and adverse action is sufficient to raise the initial inference of causation. However, his comment at the May 22 meeting was an intervening event of significant weight.

Respondent reasonably could have terminated Speegle for the legitimate reason of insubordination arising out of this comment. Therefore the Court finds that a logical reason to infer a causal relationship between the protected activity and the adverse action no longer exists. See Anderson v. Jaro Transp. Services and McGowan Excavating, Inc., ARB No. 05-011, ALJ Nos. 2004-STA-2 and 2004-STA-3 (ARB November 30, 2005).

B. Disparate Treatment

Complainant argues that he was treated more harshly than other employees who engaged in similar conduct. Respondent contends that none of the employees identified by Complainant as comparators were similarly situated. Disparate application of discipline to employees similarly situated to the complainant constitutes evidence that the employer's proffered reason for the complainant's discipline is pretext. Fabricius v. Town of Braintree, ARB No. 97-144, ALJ No. 97-CAA-14 (ARB Feb. 9, 1999). The Eleventh Circuit has specified that comparable employees must be "similarly situated in all relevant aspects" and that the most important factors are the similarity of the offenses and the nature of the punishments imposed. Riley v. Emory Univ., 136 Fed. Appx. 264 (11th Cir. 2005). Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1259 (11th Cir. 2001); Anderson v. WBMG-42, 253 F.3d 561, 565-66 (11th Cir. 2001).

The Court finds that the comparator employees offered by Complainant were not similarly situated employees. While Complainant lists several employees formally disciplined for insubordination, the Court finds that only James Jones and Santo Chiodo engaged in offenses similar to Speegle.[28] Much like Speegle, these men lashed out at a superior in front of a group of peers. Yet, these employees received warnings for their conduct before being terminated. TR 871-879. Jones and Chiodo are distinguishable, however, in that they were not supervised by Childers or Gero.[29] While a difference in supervisors is not dispositive, it is a factor in determining whether employees are similarly situated. Moore v. Ala. Dep't Corr., 137 Fed. Appx. 235, 238 (11th Cir. 2005). In this instance, the Court finds that the difference in supervisors is a significant factor due to the fact that insubordination encompasses a wide range of actions. The Court finds it highly likely that different supervisors will react differently to varying acts of insubordination, which is a legitimate explanation for differential application of discipline. See Kendrick v. Penske Transp. Serv., 220 F.3d 1220, 1233 (10th Cir. 2000). Additionally, the Court is not convinced that Jones and Chiodo's offenses were of comparable seriousness. Gero testified that he immediately terminated Speegle because he stated an intent not to obey the rules. TR 1098. Jones received a warning after he

[28] Several of the employees who were disciplined for insubordination engaged in offenses dissimilar to Speegle's. The five employees who only received reprimands for insubordination engaged in conduct including intimidating other employees or disobeying work directives. CX-24, TR 894. Dennis Wilkinson, who was terminated for insubordination, left the work site and then lied about it. TR 867. Craig O'Brien was terminated for multiple work rule violations, committing dishonesty and fraud, and repeatedly lying to his foreman. CX-30.

[29] Jones was an electrical engineer in the maintenance department and Chiodo was a nightshift worker, who fell under the supervision of Jim Henard and Mike Sheldon. TR 874; CX-26.

engaged in a letter writing campaign where he made vicious accusations against several employees and superiors. TR 876. Chiodo received a warning after an outburst of "temper and emotions" towards his foreman when he received an assignment he did not like. CX-26. There is simply not enough evidence in the record to show that Jones and Chiodo's conduct included an intent not to follow procedures. The Court finds that, in an employment setting, it is reasonable to regard disrespect for procedures as more serious than an outburst of temper or personal accusations. Next, the Court addresses Complainant's argument that Ralph Thompson engaged in a similar offense when he used profanities towards Childers in response to being accused of a safety violation. Complainant points out that Thompson was only demoted.[30] The Court finds that Thompson's situation was different in that the exchange did not take place in front of a group of co-workers. Gero, who made the decision to demote Thompson, explained that termination was too extreme for a one-on-one conversation. TR 1100-1102. The Court also notes that Childers recommended termination for Thompson. This recommendation shows that Childers was not a lenient supervisor and believed that disrespectful exchanges were grounds for termination. Lastly, the Court finds that Speegle's position as a foreman is a distinguishing factor in his comparison against these employees. Speegle admitted that he was the next highest ranking employee in the room under Childers. TR 287. The fact that he made a vulgar and disrespectful comment in the presence of subordinates establishes that his act of insubordination was considerably more serious than those discussed above. Accordingly, the Court finds that Complainant did not produce evidence that he received disparate treatment from similarly situated employees.

C. Employer's Disregard for Nuclear Safety

Complainant argues that Childers use of the phrase, "Confusion is money," and Albarado, Trest and Gero's unfamiliarity with the certification test is evidence that S&W was more interested in profits than complying with nuclear safety regulations. He argues that such a disregard for safety procedures supports a finding that Speegle's protected activity was a contributing factor in his termination. However, the context in which Childers' statement, "Confusion is money," arose was in response to Speegle's complaints regarding work practices, which the Court found were not protected activities. The Court also found that Respondent did not have knowledge of Speegle's complaints about the testing procedures. Therefore, even if Respondent showed disregard in its work practices or testing procedures, Complainant did not engage in protected activities

[30] Complainant discussed other employees, who he believes engaged in similar offenses. However, the Court does not find any of these employees similarly situated. Cook's testimony where he stated that he and Thompson were not disciplined for refusing to work their crews on an occasion when they believed their crews needed certification was vague and does not implicate a similar offense. TR 227. Cook's testimony regarding Cecil McCoy's use of profanities towards Childers in refusing a work directive is also highly questionable. Cook could not recall the specifics of the incident, including who was present, exactly what McCoy said, or if he eventually obeyed the directive. TR 267-272. Gat Atkinson's admitted use of profanities towards Childers in a disagreement over a work assignment did not occur in front of a group or co-workers. TR 566.

involving these areas. Conversely, Respondent's reaction to the issue of apprentice certification shows good faith on their part. Gero inquired of the corporate and engineering departments as to the validity of certifying apprentices and the meaning of the language in the G-55. The issue was even addressed in the PER process, which found that the certification of apprentices was in accordance with the G-55. CX-18. Based on the foregoing, the Court does not find any evidence of Respondent's disregard for nuclear safety as a contributing factor to its adverse action against Complainant.

D. Shifting Justifications for Adverse Action

Complainant argues that Respondent's false and shifting reasons for his termination support a finding that these reasons are pretext. Complainant asserts that Respondent first told OSHA that it terminated him for "insubordinate attitude and foul language," then told the NRC and TVA investigators that foul language had nothing to do with his termination. The Court, however, does not find these positions incompatible. Gero testified that he wrote only "insubordination" on the paperwork he sent to Trest, and he testified that profanity had nothing to do with Speegle's termination. TR 1038-1039, 1100. He stated several times that he found Speegle's behavior egregious enough to warrant termination, because he refused to follow the G-55. TR 1098, 1102. The Court found Gero's testimony consistent in this regard. The fact that the OSHA position statement additionally lists foul language does not negate Gero's testimony and is not unreasonable given that Speegle used foul language in his insubordinate comment. The Court finds that Respondent reasons for Speegle's termination were not false.[31]

E. Merits of the Protected Activity

Complainant argues that the merits of his complaints are evidence of Respondent's unlawful motive. He argues that TVA mandated that the testing panel be changed from the "flat panel" to the "complex panel" and that the NRC confirmed improper coaching took place during testing. ERA case law holds that the technical merits of the employee's complaints may provide a motive for the employer to retaliate. Seater v. So. Cal. Edison Co., ARB No. 96-013, ALJ No. 95-ERA-13, slip op. at 4 (ARB Sept. 27, 1996). Regardless, the Court found that S&W was unaware of Speegle's complaints about the testing procedures; therefore the merits of these complaints are irrelevant to Complainant's attempt to establish an unlawful motive.

Based on the evidence as a whole, the Court finds that Complainant has not presented sufficient evidence to meet his burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action against him. The Court emphasizes that an employer may terminate an employee for a good or

[31] Additionally, the Court does not find Complainant's series of hypothetical variations of the comment to shed any light on Respondent's rationale.

bad reason under federal law, so long as there is not discrimination on the employer's part. The Court is charged only with determining whether the employer was motivated by discrimination, and not whether the action was prudent or fair. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999). In the present case, Complainant did not present direct or circumstantial evidence of discrimination.

CONCLUSION AND RECOMMENDED ORDER

In conclusion, the Court finds that the record does not contain any evidence to suggest that the adverse action taken against Complainant was related to his protected activity. Based on the foregoing, Complainant's complaint must be dismissed.

Accordingly, the Court recommends that Complainant's claim be **DISMISSED.**

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).